AMERICAN
LAND TITLE
ASSOCIATION

December 23, 2009

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20511

Re: ***Proposed Changes to Closed-End Mortgage Rules (Docket No. R-1366)***

Dear Ms. Johnson:

The American Land Title Association ("ALTA") appreciates this opportunity to comment on the proposed rule amending Regulation Z with respect to closed-end mortgages ("Proposed Rule"). ALTA, founded in 1907, is the national trade association and voice of the real estate settlement services, abstract and title insurance industry. With more than 8,000 offices throughout the country, ALTA members operate in every county in the United States. ALTA members search, review and insure land titles to protect home buyers and mortgage lenders who invest in real estate. Nearly 3,000 title insurance companies, title agents, independent abstracters, title searchers and attorneys are active members, ranging from small, one-county operations, to large national title insurers.

ALTA and its members support enhanced consumer protection in the residential mortgage loan process. To this end, ALTA supports many of the new initiatives in the Proposed Rule. Specifically, ALTA strongly supports the Board's efforts to curb abuses by loan brokers and to prohibit steering. ALTA also commends the Board's efforts to reduce consumer surprise by requiring advance notice of payment increases in adjustable rate mortgages and when a creditor places property insurance.

However, certain aspects of the Proposed Rule require further consideration by the Board. Most importantly, the proposal fails to recognize that title insurance, which offers protections to consumers unrelated to the loan, is distinct from fees and costs imposed by the lender. Title insurance premiums and related costs are more appropriately treated as property insurance premiums, which the Board has proposed to exclude from the finance charge. We also are concerned that the proposal conflicts with the Truth in Lending Act ("TILA") in such a manner that it may not be supported by sufficient statutory authority. We further note that implementing significant changes to Regulation Z at the same time the industry struggles to comply with the complex changes that HUD has initiated under the Real Estate Settlement Procedures Act ("RESPA") is dangerously disruptive and may lead to duplicative or contradictory disclosures. The Rule as proposed may also, ironically, obscure the true cost of loans offered by different lenders, and thus hinder consumer shopping. The Proposed Rule also would have unintended, but serious, consequences for consumers by diminishing the availability of credit. Finally, we have pointed out how the different treatment of the costs related to lender's title policies, as

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opposed to owner's title policies would actually complicate the calculation of the finance charge, and thus frustrate one goal of the Proposed Rule.

Concerns Related to the Distinct Nature of Title Insurance: The Proposed Rule would lump title insurance related costs into the lender's fees and charges by including them in the finance charge. The Proposed Rule, however, excludes property insurance from the finance charge. Property insurance is treated as a settlement service distinct from the loan. The same is true for title insurance. Even in the sale of property where no mortgage is recorded, a prudent buyer will always require a seller to produce evidence of title and a title insurance policy to back it up. These services offer additional assurance to the lender where purchase-money financing is being extended, but like property insurance, title insurance services are distinct from the loan and necessary to the transaction even if a mortgage is not being placed on the property.

Like homeowners insurance, title insurance is highly regulated by state insurance commissioners. It is unclear how consumers would benefit from having the cost of a state-regulated service offered by a third-party included in the finance charge. Generally finance charges are considered by consumers to be the cost of credit imposed upon them by lenders. Where the service is provided by a state-regulated entity, it seems to be deceptive to include the cost for this service in the finance charge.

As with property insurance, ALTA and its members urge the Board to recognize that title insurance offers significant protections to homeowners, even though – like property insurance – it is required by and benefits the lender as well. There is no compelling reason to treat title insurance premiums and related title costs differently than property insurance premiums.

Concerns with Statutory Authority: The preamble to the Proposed Rule provides an explanation of the legal authority on which the Board relies to negate the statutory exceptions in Section 106(e) of TILA, which expressly excludes title insurance related costs from the finance charge. 74 F.R. 43245 (August 26, 2009). The explanation is helpful and convincing in part. For example, the Board notes that creditors have begun to "unbundle" or shift the cost of credit to fees or charges that are excluded from the finance charge. The Board notes:

> Congress did not anticipate how such unbundling would undermine the purposes of TILA, when it enacted the exceptions. For example, fees for preparation of loan-related documents are excluded from the finance charge by TILA Section 106(e), 15 U.S.C. 1605(e); in practice documentation preparation fees have become a common vehicle used by creditors to enhance their revenue without having any impact on the finance charge or APR. *Id.*

This type of analysis provides a clear and convincing justification for use of the Board's authority under Sections 105(a) and 105(f) of TILA to include document preparation fees in the finance charge despite the Congressional direction to the contrary. However, the Preamble provides no clear justification for the exercise of this same exception authority when it comes to non-creditor related fees that Congress decided to exclude from the finance charge on real estate secured loans. Without a stronger statement of the need to reject the Congressional directive related to title insurance costs, it is unclear that this portion of the Board's Proposed Rule is supported by adequate statutory authority.

Concerns that the Proposed Rule Duplicates Information Required in the New RESPA Forms and Disclosures: In the Proposed Rule, the Board acknowledges that the Department of Housing and Urban

Development ("HUD") has recently implemented its own revised disclosures and forms which will be fully implemented on January 1, 2010. Yet the commentary seems to ignore at least two important points of comparison to HUD's new rule: first, many of the provisions disclosed in either the new Good Faith Estimate form ("GFE") and/or the new HUD-1 Settlement Statement ("HUD-1") contain identical pieces of information to that required in the Proposed Rule. Second, the different manner in which certain provisions and similar terms are disparately characterized between the two forms will cause significant consumer confusion.

In promulgating the new GFE and HUD-1, HUD believed that it had accomplished many of the Board's goals to "make the information clearer and more conspicuous." Many of the changes proposed by the Board in this rule-making are already disclosed in the new GFE including:

1. Summarizing key loan features such as loan term, amount, type, and disclosing total settlement charges.
2. Requiring disclosure of potential changes to the interest rate and monthly payment.

Not only will the GFE provide this information, but a verification of the continuing applicability of these terms is now further ingrained into a consumer's mindset by the repetition and confirmation of these items in page three of the new HUD-1 form, which provides both a confirmation of non-substantial changes to settlement charges (Comparison of Good Faith Estimate and HUD-1 Charges) and the re-disclosure of Loan Terms.[1]

Previously, ALTA members were generally unaffected by lender disclosures, other than the sheer volume of such forms arriving at the settlement table for presentment by the settlement agent and signature by the prospective borrower. However, with the comparison of costs and loan terms sections on the new HUD-1, ALTA members performing settlement services will be thrown into the fray of explaining terms that have little, if anything, to do with the settlement functions ALTA members perform. If the Board enacts this Proposed Rule, it will add even more documentation that will require further explanation and/or differentiation by ALTA members. Settlement agents generally are not trained to discuss such legal nuances and, in some states, are prohibited by law from doing so.

Concerns that the Proposed Rule Conflicts With Information Required in the New RESPA Forms and Disclosures (Interest Rate Disclosures): For some time, the truth in lending disclosures have concentrated on the Annual Percentage Rate as providing the best information to consumers in connection with borrowing costs in mortgage financing. However, in its recent adoption of disclosure forms, HUD has failed to follow this disclosure scheme and instead refers consistently to a contract rate of interest coupled with a disclosure of estimated settlement costs subject to prescribed tolerances for later change. ALTA takes no position on whether HUD's model or the Board's model provides consumers with better information to shop for mortgage financing. Our concern is that providing both methods of disclosures simultaneously will unnecessarily confuse consumers.

To illustrate, we ask the Board to consider the timing of the new RESPA disclosures and the disclosures to be required under the Proposed Rule, and the information contained in each:

[1] We have found nothing in the description of the consumer testing performed in the connection with the Proposed Rule to indicate that testing participants were also provided copies of either a GFE or HUD-1 under HUD's new rule to determine whether the inconsistency or duplication of information was a positive consumer benefit.

1. GFE Disclosure (Timing – three days after HUD-defined "application") contains information on the contract interest rate plus an estimate of certain itemized settlement cost categories.
2. Early TILA Disclosure (Timing – three days after Board-defined "application") contains reference to the APR, the interest rate, and the "total settlement charges" (non-itemized), with reference to the GFE and HUD-1 for details.
3. TILA Disclosure Before Consummation (Timing – three days before consummation of the transaction) contains reference to the APR, the interest rate, the "total settlement charges" (non-itemized), with reference to the GFE and HUD-1 for details.
4. HUD-1 (Timing – at closing or day before) contains "Loan Terms" on new page three with a contract interest rate. Actual charges are shown on other portions of the form.

While the truth in lending forms contain information on both the contract interest rate as well as the Annual Percentage Rate, the Annual Percentage Rate is more prominently highlighted. Thus, a consumer receiving disclosure documents may be confused between the different "interest rates" on the different disclosure forms, even where there has been no change in the terms of the loan or settlement costs.

Concerns that the Proposed Rule Conflicts With Information Required in the New RESPA Forms and Disclosures (Total Settlement Charges): The new truth in lending forms require the disclosure of "Total Settlement Charges". Section 226.38 of the Proposed Rule indicates that "total settlement charges" is determined by "using that term as disclosed under Regulation X, 12 CFR part 3500" and makes reference to the GFE and HUD-1 for details.

First, Regulation X contains no specific definition of "Total Settlement Charges". Nor does the HUD-1 form have any such designation. The closest described term, "Total Estimated Settlement Charges", is reflected on page one of the new GFE form, and as explained below, is not the same as the "Total Settlement Charges" contemplated by the Board.

The GFE line "Total Estimated Settlement Charges" is comprised of several broad categories of fees and charges reflected on page two of the new GFE form. However, the following items would generally not be included as settlement charges for the Annual Percentage Rate calculation under the Proposed Rule:

Owner's Title Insurance – Under the Proposed Rule, the exclusion from finance charge calculation remains for "any charge of a type payable in a comparable cash transaction." (Section 226.4) Since owner's title insurance would be purchased in a comparable cash sale, the charge would be excluded.

Recording Fees (portion) – The new GFE form includes recording charges for both deed and mortgage recordings. Since the charge for the recording of a deed would be payable in a comparable cash transaction, this portion of the charges in the applicable GFE block would not be used for finance charge calculations.

Transfer Taxes (portion) – Similar to recording fees above, the new GFE form includes transfer taxes related both for deed transfers and mortgage transfers. Since the charge for transfer tax on a deed would be payable in a comparable cash transaction, this portion of the charges in the applicable GFE block would not be used for finance charge calculations.

Homeowner's Insurance – Under the Proposed Rule, Section 226.4(d)(2), premiums for homeowner's insurance are finance charge calculations under most circumstances.

As a result, using the "Total Estimated Settlement Charges" amount on the GFE would likely result in an incorrect reference to total settlement charges for a truth in lending calculation under the Proposed Rule.

The Board Should Coordinate the Proposed Rule with the New RESPA Rules Prior to Further Implementation: In the preamble of the Proposed Rule, the Board indicates:

> The Board anticipates working with the Department of Housing and Urban Development (HUD) to ensure that TILA and Real Estate Settlement Procedures Act of 1974 (RESPA) are compatible and complimentary, including potentially developing a single disclosure form that creditors could use to combine the initial disclosures under TILA and RESPA. The two statutes have considerable overlap. Harmonizing the two disclosure schemes would ensure that consumers receive consistent information under both laws.

We strongly agree with the Board's assessment that the TILA and RESPA disclosures should be harmonized and strongly suggest that such harmonizing occur <u>before</u> the implementation of a disclosure scheme that significantly overlaps with the new RESPA requirements and appears to contain information that is inconsistent with the information contained in the new RESPA requirements.

Concerns About Assisting Consumer Shopping: ALTA members also believe that incorporating title insurance related costs into the finance charge will not assist borrowers in shopping for credit or title related services.

A primary goal of TILA and Regulation Z – and the Proposed Rule – is to assist borrowers in comparing loan costs. However, shopping generally requires that the consumer to be able to identify and compare the loan origination fees and interest rates charged by different lenders. Under the Proposed Rule, the primary tool for comparing different loans will be the Annual Percentage Rate. The difference between loan offerings would be more apparent in the APR if the amounts and rates the reflected in the APR included only rates, fees and charges imposed by the lender.

Title insurance related costs tend to vary very little within a state. This is true to a great extent because of state regulation of title insurance premiums. Including the cost of title insurance related fees in the finance charge (and thus the Annual Percentage Rate) of two similar loans, one of which is more expensive than the other, will only reduce the difference between the disclosed Annual Percentage Rates. The difference between the Annual Percentage Rates would be greater if the similar title insurance related costs were excluded from the finance charge, thereby giving consumers a more obvious signal to be cautious. Thus, the Proposed Rule will diminish the effectiveness of Regulation Z as a disclosure of loan costs.

Also, in situations in which there are modest variations in title insurance related costs, the fact that these fees are lumped into the finance charge with the lender's rates, fees and costs, will only further obscure any such variation. Consumers would be better served to have each set of fees clearly delineated for the loans they are considering, so that the consumer can shop for the lowest cost loan.

High-Cost Loan Law Concerns: Treating all fees imposed by title insurers and title agents as finance charges would have a detrimental impact on consumers by diminishing their access to credit. It would make more loans subject to the Home Owner's Equity Protection Act ("HOEPA"), the new federal classification of "higher-priced mortgage loans", and many of the state higher cost or predatory mortgage loan laws. Due to the extreme regulatory risk of making a loan subject to HOEPA, or similar state high-cost or predatory loan laws, most creditors do not make these loans.

Because title insurance offers extensive protection to both lenders and homeowners, the title related charges are not insubstantial. Thus, including fees related to title insurance will have a substantial effect on the points and fees test under HOEPA and similar state laws. Loans that would not have come close to the HOEPA threshold in the past now will be considered too risky for lenders to contemplate. This is particularly true of smaller dollar amount loans, where the title insurance related costs represent a proportionally larger fractional percentage of the loan amount. Based on what appears to be a limited study, the Board has predicted that of loans closed in 2008, only 0.6 percent of these loans would have become subject to HOEPA under the Proposed Rule. However, the Board notes that the database used in this study includes only prime and near-prime loans, the loans least likely to be affected by this change. Due to the potential impact that could arise if title insurance related costs are included in the finance charge, we strongly recommend that, at the very least, the Board conduct further and more in-depth studies of the potential impact of this aspect of the Proposed Rule before it is implemented.

In attempting to find alternatives to the Proposed Rule that would avoid this unintended effect, ALTA considered suggesting that the Board adopt the Proposed Rule, but change the regulatory definitions of loans subject to HOEPA and the federal higher priced mortgage loan rules. If the Board increased the thresholds for these tests, the inclusion of title insurance related costs in the finance charge would not significantly increase the number of loans that would become subject to these rules. However, most state high-cost and predatory lending laws incorporate the current federal definition of finance charges into the state high-cost tests. Thus, while this suggested alternative would be helpful in certain parts of the country, in other significant areas of the country the Proposed Rule would continue to restrict credit. This is particularly acute with smaller dollar amount loans, which tend to occur most often in areas that have been traditionally underserved, such as rural areas and the inner city.

Practical Concerns Regarding the Different Treatment of Lender and Owner Policies: The Proposed Rule also fails to address a technical issue that will arise if, as proposed, the cost related to a lender's title policy is treated as a finance charge, but the costs related to an owner's title policy are not. If the borrower elects to obtain an owner's policy, certain title insurance related fees such as those for title examination, title abstract, and survey will be incurred regardless of whether the lender requires them as a condition for granting a loan. And, the cost of many of these services may increase. For example, many title insurers may require a title search to be conducted back through the period the property was owned by one or two prior owners before issuing a lender's title policy. However, for an owner's title policy, where the insurer's risk is greater, the underwriting necessary to issue the policy may be more substantial, and the insurer may often require a longer title search to be conducted, typically going back 60 years. Also, survey coverage is usually provided on a lender's policy without requiring a survey. For an owner's policy, where the risk of loss is greater, title insurers generally require a survey. Finally, on the same transaction, a lender's policy is generally less expensive if the borrower is also purchasing an owner's policy.

The interplay between the costs related to lender's policies and owner's policies will create uncertainty as to whether title related costs, or some portion of them, should be included in the finance charge. If a survey would not be required for a lender's policy, but would be required for an owner's policy, may the cost of the survey be excluded from the finance charge? If the cost of the title search is increased because the owner has elected to purchase an owner's policy, should the total cost of the search be included in the finance charge, should it be excluded completely – since the more complete search required for the owner's policy will replaced the limited search necessary for a lender's policy, or should only the increased portion of the cost of the title search be excluded? Also, assume that a creditor bases its disclosures, including the cost of the premium for the lender's policy, on the assumption that no owner's policy will be purchased. Prior to closing, however, the owner decides to purchase a policy and the title insurer or title agent reduces the premium on the lender's policy. The creditor has now over-disclosed the finance charge on the early disclosures, which is permitted. However, if another component of the finance charge has increased since the time of the disclosures, may the lender safely offset this increase by the lower premium on the lender's policy and thus avoid re-disclosures and another three-day waiting period?

The Board is correct in excluding the cost related to an owner's title insurance policy from the finance charge. However, by applying the opposite treatment to the costs related to a lender's title insurance policy, creditors will again be faced with the conundrum of trying to decide what is in and what is out of the finance charge. Thus, if the Board includes the cost of a lender's title insurance policy in the finance charge, it will fail in one of its announced goals in issuing the Proposed Rule – creating a simpler test for determining the amount of the finance charge.

In addition, to the extent the inclusion of the additional costs for an owner's policy ends up in the finance charge, this could encourage consumers not to purchase an owner's policy. Such a result would have the perverse effect of one attempt to improve consumer protection – the revised TILA disclosures – reducing the availability of another equally important consumer protection – the coverage offered by an owner's title policy.

We encourage the Board to apply the same rule for title insurance related costs as it does for property insurance. Under existing Regulation Z and the Proposed Rule, the premium for property insurance is excluded from the finance charge. Property insurance protects both the owner and the lender – and is required by the lender, the same as title insurance. There seems to be no justification for treating these two types of insurance differently. All title insurance related costs should be excluded from the finance charge.

Implementation Concerns: Whatever decisions the Board makes with regard to the concerns expressed above, the final rule will have a dramatic impact on the mortgage and, more generally, housing industries. The Proposed Rule's provisions regarding Annual Percentage Rate calculations and its wholesale changes to the form and substance of the TILA disclosures are likely to require significant operational and workflow changes by both creditors and their title industry partners. In the past 18 months, the mortgage finance and title industries have absorbed two rounds of major Regulation Z amendments and expended enormous efforts in implementing the final RESPA rule. It is likely that much of 2010 will be needed for industry players to continue adapting to the significant regulatory changes now or soon to be in place. Considering this, another wholesale change to Regulation Z that would significantly impact both creditors and their title industry partners should not be implemented for at least another 18 months, if not longer.

ALTA and its members urge the Board to reconsider the Proposed Rule to the extent the Proposed Rule treats title insurance and related title services differently from property insurance. ALTA and its members also believe that consumers and creditors would benefit if the Board reconsidered its Proposed Rule in light of the new RESPA regulations that go into effect on January 1, 2010. The combined effect of the new RESPA disclosures and those suggested under the Proposed Rule may reduce the overall readability of federal disclosures and further limit consumer understanding of mortgage loan transactions. The Board should not include title insurance related costs in the finance charge. At the very least, the Board should conduct further studies on how many transactions would become high-cost mortgage loans if title related costs are included in the finance charge. ALTA is not convinced that the Board has accurately identified the number or scope of loans that would be considered high-cost mortgage loans under the Proposed Rule. The Board may be significantly understating the impact of the Proposed Rule on the availability of credit. The Proposed Rule, as it applies to title related costs, also may complicate, rather than simplify, the determination of the finance charge. Finally, whatever form the final rule takes, the Board should provide the industry with sufficient time to implement the major changes contemplated in the Proposed Rule.

ALTA and its members appreciate the opportunity to comment on the Proposed Rule, and would welcome the opportunity to further work with the Board to address these important public policy concerns. Please feel free to contact me with any questions at 202-261-2930.

Best regards,

Kurt Pfotenhauer

Kurt Pfotenhauer
Chief Executive Officer